

THE REGULATORY SPACE OF EQUALITY AND HUMAN RIGHTS IN BRITAIN: THE ROLE OF THE EQUALITY AND HUMAN RIGHTS COMMISSION

ABSTRACT

The Equality and Human Rights Commission (EHRC) was created in 2006 with wide-ranging powers to protect human rights, promote equal opportunities and encourage mutual respect between different groups. Alongside the Commission, individuals, through the courts and sector-specific enforcers (such as ombudsmen and regulators), have also been given equality and human rights enforcement powers. Within this enforcement landscape, the Commission has struggled to craft an enforcement role for itself. For the first time, this article, through the mapping of these different actors in their shared regulatory space, outlines a role for the EHRC in equality and human rights enforcement. This role consists of three primary tasks: (1) taking action that courts and sector-specific enforcers are unable to perform; (2) overcoming some of the limitations of private enforcement in the courts; and (3) coordinating and supporting sector-specific enforcers. The article concludes by exploring how the EHRC can effectively fulfil this role.

INTRODUCTION

The Equality and Human Rights Commission (EHRC) was created in 2006 to merge the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission (the legacy Commissions). The establishment of a single commission was intended to utilise the expertise of the legacy commissions to take a

cross-cutting approach that would address all equality and human rights concerns within society. It was envisaged that the Commission would act as a single point of contact for individuals and organisations, to tackle multiple discrimination, to pursue a coherent approach to combating discrimination and to identify and promote creative responses to problems.¹ The Commission was therefore made responsible for tackling discrimination across all protected characteristics of discrimination and for protecting and promoting human rights across England, Wales and Scotland.² To achieve this remit the Commission was given a wide range of enforcement powers including monitoring the effectiveness of equality and human rights law;³ monitoring progress in society;⁴ publishing information, providing advice and issuing codes of practice;⁵ conducting inquiries;⁶ issuing grants;⁷ undertaking investigations;⁸ providing legal assistance for equality claims;⁹ instituting or intervening in legal proceedings;¹⁰ and assessing compliance with the public sector duties.¹¹ The first Chair, Trevor Phillips, outlined an ambitious role for the EHRC that went beyond the work of the legacy Commissions (which he argued had focused on giving groups a voice and retrospective remedies). This role

¹ Department for Trade and Industry, *Fairness For All: A New Commission for Equality and Human Rights* (Cm 6185, 2004) paras 1.14-1.17.

² In relation to Scotland the Commission's remit extends only to enforcing equality law: Equality Act 2006, ss 1, 8-9.

³ *Ibid*, s 11.

⁴ *Ibid*, s 12.

⁵ *Ibid*, ss 13-15.

⁶ *Ibid*, s 16.

⁷ *Ibid*, s 17.

⁸ *Ibid*, ss 20-24.

⁹ *Ibid*, ss 28-29.

¹⁰ *Ibid*, ss 30.

¹¹ *Ibid*, ss 31-32.

aimed for institutional change by addressing the causes that lie behind discrimination and promoting systemic change.¹²

However, the Commission was to be hampered in realising these ambitions as it encountered a number of significant problems in its early years of operation. First, groups who had seen the legacy Commissions as campaign groups for their interests felt alienated from the EHRC as they believed they were no longer being represented.¹³ Second, the Commission struggled to go beyond the work of the legacy Commissions (who had focused on equality) and incorporate human rights into its work, which resulted in public criticism from the Joint Committee on Human Rights.¹⁴ Third, there were problems with the Commission's internal structure and the ability of the personnel (many of whom had transferred from the existing commissions) to be able to work and speak with a single voice, which resulted in six commissioners resigning.¹⁵ Fourth, the EHRC was criticised for its management of financial resources when it had its first two sets of accounts qualified.¹⁶ Finally, and an issue that underlaid many of the other problems the

¹² Trevor Phillips Speech (Department for Children, Schools and Families and Department for Innovation, Universities and Skills Joint Research Conference 2007, 16 November 2007) <<http://webarchive.nationalarchives.gov.uk/20080821115857/dcsf.gov.uk/research/data/general/trevor%20phillips%20keynote%20speech.doc>> accessed 3 April 2018; EHRC, 'Business Plan 2008/9' (EHRC 2008) 4.

¹³ J Squires *Is the EHRC working?* (2009), available at <https://www.theguardian.com/commentisfree/libertycentral/2009/jul/21/equality-human-rights-commission>; 1990 Trusts, 'Our Rights, Our Future' (1990 Trust 2005); T Choudhury, 'The Commission for Equality and Human Rights: Designing the Big Tent' (2006) 13 *Maastricht Journal of European and Comparative Law* 312-22; C O'Cinneide, 'The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times' (2007) 36(2) *Industrial Law Journal* 141.

¹⁵ D Mabbett, 'Aspirational Legalism and the Role of the Equality and Human Rights Commission in Equality Policy' (2008) 79(1) The Political Quarterly 45; Joint Committee on Human Rights, *Equality and Human Rights Commission* (2009-10, HL 72, HC 183).

¹⁶ Comptroller and Auditor General, *Equality and Human Rights Commission Annual Report and Accounts 2006-08* (HC 2008-09, 632); Committee of Public Accounts, *Equality and Human Rights Commission* (HC 2009-10, 124).

Commission experienced, was the role of the EHRC in equality and human rights enforcement.¹⁷ It was unclear whether it was the role of the Commission to ensure compliance with the law (ie focus on ‘getting the bad guys’) or to promote systemic change by encouraging organisations to go beyond formal legal requirements and achieve a higher standard of implementation (ie focus on ‘guiding the good guys’).¹⁸

The problems that the Commission encountered in its first few years of operation combined with wider government agendas, particularly the austerity and anti-NDPB agendas, acted as justifications for government involvement in the reform of the EHRC.¹⁹ The Coalition government subsequently launched a consultation about the role and functions of the Commission.²⁰ The government concluded, as a result of this consultation, that the EHRC should be recast as a strategic regulator, only acting where it adds value, which has subsequently been reiterated by the Commission itself.²¹ In light of this new strategic role, the Commission’s advice helpline, strategic grants programme and conciliation remit were removed and its budget drastically cut (from £70.3 million in 2007 to £19.47 million in 2018).²²

¹⁷ K Hampton *The wrong leadership* (2009), available at <https://www.theguardian.com/commentisfree/libertycentral/2009/jul/21/equality-human-rights-commission>.

¹⁸ N Crowther, ‘Bridging the divide – matters to be taken into account regarding the integration of the functions of national equality bodies and national human rights institutions’ (October 2013); T Pegram, *The Equality and Human Rights Commission: Challenges and Opportunities* (AHRC 2011) 20.

¹⁹ K Tonkiss, ‘Contesting human rights through institutional reform: the case of the UK Equality and Human Rights Commission’ (2016) 20(4) *The International Journal of Human Rights* 491.

²⁰ HM Government, ‘Building a fairer Britain: Reform of the Equality and Human Rights Commission’ (HM Government 2011).

²¹ HM Government, *Building a fairer Britain: Reform of the Equality and Human Rights Commission – Response to the Consultation* (HM Government 2012) 15; EHRC, *Strategic plan 2012-15* (EHRC 2012) 13.

²² N Crowther, ‘Bridging the divide – matters to be taken into account regarding the integration of the functions of national equality bodies and national human rights institutions’ (October 2013) 16; EHRC, ‘Business Plan: 2018/19’ (EHRC 2018) 38; EHRC, ‘Business Plan 2008/9’ (EHRC 2008) 32.

The EHRC has since addressed many of the problems that plagued it at its creation: incorporating the views of different groups while at the same time making clear that it is not the Commission's place to lobby for partisan interests; more heavily focusing on human rights; establishing a settled governance structure; and having its subsequent accounts approved without qualification. However, one issue that is still unresolved is the strategic role the EHRC should play in equality and human rights enforcement (ie should it focus on ensuring compliance with the law and/or promote higher standards of implementation?). The second iteration of the EHRC (under the chairship of Onora O'Neill) focused more on promotion and implementation ('shift...to a more enabling role: using our expertise and influence to support the development of policies and services that promote equality of opportunity and safeguard our fundamental human rights...legal action is our last resort, when nudge, persuasion and advice have not proved effective').²³ In contrast, the third and current iteration of the Commission (under the chairship of David Isaac) has placed a heavier emphasis on ensuring compliance ('keen for the Commission to focus more on the use of its legal powers...we should become a more muscular regulator').²⁴ This issue takes on added importance in the context of the significant budget cuts the Commission has undertaken and heavy public scrutiny it has endured. Unfortunately, there is currently no clear conception of what a strategic role for the EHRC looks like. This is because the majority of research on equality and human rights

²³ EHRC, *Strategic plan 2012-15* (Stationary Office 2012) 8, 11.

²⁴ D Isaac *Prioritising our legal work* (2017), available at <https://www.equalityhumanrights.com/en/our-work/blogs/prioritising-our-legal-work>; D Isaac *10 years on: the fight is far from over* (2017), available at <https://www.equalityhumanrights.com/en/our-work/blogs/prioritising-our-legal-work>.

enforcement focuses upon (private) individual enforcement through the courts.²⁵ In contrast, research on other (public) enforcement mechanisms (particularly the EHRC) is sparse.²⁶

This article begins to tackle this research gap by outlining a role for the Commission in equality and human rights enforcement. It does this by utilising the concept of regulatory space to explore the roles of the major equality and human rights enforcement actors, courts and sector-specific enforcers (the latter is used in the article to refer collectively to regulators, inspectorates, and ombudsmen), through which it is possible to observe enforcement spaces that the EHRC can fill (ie act strategically to add value). By taking this approach, it is argued that the enforcement role of the EHRC consists of three primary tasks: (1) carrying out enforcement action that the other actors are unable to perform; (2) overcoming some of the limitations of individual enforcement via the courts; and (3) coordinating and supporting sector-specific enforcers. At the same time as elucidating an enforcement role for the EHRC, the article also intends to shed light on the utility of looking beyond the courts when exploring the enforcement of equality and human rights law.

²⁵ For example literature on the workings of sections 3 and 4 of the Human Rights Act 1998 and s 149 Equality Act 2010: A Kavanagh, *Constitutional Review Under the UK Human Rights Act* (CUP 2009); A Young, 'Is dialogue working under the Human Rights Act 1998?' [2011] Public Law 773; C Chandrachud, 'Reconfiguring the discourse on political responses to declarations of incompatibility' [2014] Public Law 624; S Fredman, 'The Public Sector Equality Duty' (2011) 40 *Industrial Law Journal* 405.

²⁶ With the notable exceptions of O'Cinneide's work on the EHRC and O'Briens work on ombudsmen which are referred to throughout the article. Saggar has also published work on the EHRC but this focused on equality and economic regulation, whereas the present article focuses more broadly on equality and human rights in social regulation: S Saggar, 'Regulation, Equality and the Public Interest' (2008) 79(1) *The Political Quarterly* 82.

The article is divided into three sections. The first section briefly explains the concept of regulatory space and justifies its use in relation to equality and human rights enforcement bodies. The second section then examines the roles of two of the major types of enforcement body (courts and sector-specific enforcers) particularly focusing on the enforcement tasks these bodies are unable, or ill-suited, to fulfil and the enforcement spaces these create. Through outlining these spaces, the final section constructs a strategic enforcement role for the Commission and illustrates how, building on the existing practices of the EHRC, this role can be accomplished.

REGULATORY SPACE

The concept of regulatory space was introduced by Hancher and Moran in the context of economic regulation to challenge the traditional orthodox hierarchical view of regulation.²⁷ This orthodox view regarded regulation as state enacted legal rules enforced by a single state regulator against private regulatees.²⁸ In contrast, regulatory space attempts to capture the increasingly complex reality of regulation. It uses the metaphor of space to recognise that regulation is an area available for occupation by different actors. In this way, in divergence to the orthodox view, regulation is seen as not just consisting of a hierarchical relationship between a regulator and regulatees but also includes a wide range of other interested actors (eg individuals, charities, non-governmental organisations, state bodies) that also possess regulatory resources to various degrees.²⁹

²⁷ L Hancher and M Moran, 'Organizing Regulatory Space' in L Hancher and M Moran (eds), *Capitalism, Culture, and Economic Regulation* (Oxford: OUP, 1989) 277.

²⁸ C Scott, 'Analysing regulatory space: fragmented resources and institutional design' [2001] Public Law 329, 332.

²⁹ *ibid* 330.

By using the concept of open space, Hancher and Moran recognise that the habitation of the regulatory field is open to dispute by different bodies so that the task of regulation is not necessarily evenly divided between actors and roles emerge via struggle (ie there will be major and minor participants in the regulatory process).³⁰ This better fits modern experiences of regulation as it recognises that, rather than being concentrated in a single body, regulatory power and resources are increasingly being dispersed between different bodies.³¹ This dispersal of power and resources, and consequently the creation of regulatory space, is generally not a conscious deliberate act, it develops over time, on a piecemeal basis, as different governments alter the powers of different bodies and establish new bodies with new functions.³² Therefore, in order to understand regulation in a particular sector, investigators need to focus on the whole configuration of resources and relations within the shared regulatory space (ie the identity of the bodies within regulatory space, the roles they fulfil and the interactions between them).³³

Since the introduction of the concept of regulatory space by Hancher and Moran, regulatory theory has been expanded in two significant ways that are relevant to this article. The first is the extension to public bodies. Traditionally, regulatory theory focused on public bodies regulating private organisations, with regulation of public bodies by public bodies (where one public body seeks to change the behaviour of another public

³⁰ L Hancher and M Moran, 'Organizing Regulatory Space' in L Hancher and M Moran (eds), *Capitalism, Culture, and Economic Regulation* (Oxford: OUP, 1989) 277.

³¹ C Scott, 'Analysing regulatory space: fragmented resources and institutional design' [2001] Public Law 329, 330.

³² J Freeman and J Rossi, 'Agency Coordination in Shared Regulatory Space' (2012) 125(5) Harvard Law Review 1131, 1143.

³³ C Scott, 'Analysing regulatory space: fragmented resources and institutional design' [2001] Public Law 329, 330-331.

body) thought to be largely ineffective.³⁴ More recently, work by Hood and colleagues has shown that regulation inside government is a big and diverse business and can be more effective than originally thought.³⁵ This is important as, although enforcement of equality and human rights does involve public bodies regulating private organisations (eg the EHRC regulating employers), it also heavily involves public bodies regulating other public bodies (such as sector-specific enforcers regulating schools and hospitals).

A second expansion of regulatory space has been its extension to social regulation. The concept was originally introduced in the domain of economic regulation and its early uses were in this context,³⁶ however, the concept's increasing relevance to social regulation has been recognised.³⁷ This ties in with the increasing trend in the regulation literature to expand the field of regulation to include social regulation.³⁸ This has seen the use of regulatory space extended to areas of social regulation such as state contracting-out of public services and genetic databases.³⁹ Thus, when the concept of regulatory space was originally devised, it was unlikely to be envisaged that it would be applicable to the enforcement of equality and human rights law. Yet, the concept is particularly appropriate

³⁴ J Q Wilson and P Rachal, 'Can the government regulate itself?' (1977) 46 Public Interest 3.

³⁵ C Hood and others, *Regulation inside Government* (Oxford: OUP, 1999).

³⁶ For instance it was utilised in relation to the regulation of accountants, telecommunications and utilities: J Young, 'Outlining Regulatory Space: Agenda Issues at the FASB' (1994) 19(1) Accounting Organisations and Society 83; C Hall, C Hood and C Scott, *Telecommunications Regulation: Culture, Chaos and Interdependence Inside the Regulatory Process* (Abingdon: Routledge, 1999); T Prosser, 'Theorising Utility Regulation' (1999) 62(2) Modern Law Review 196.

³⁷ C Scott, 'Analysing regulatory space: fragmented resources and institutional design' [2001] Public Law 329; J Freeman and J Rossi, 'Agency Coordination in Shared Regulatory Space' (2012) 125(5) Harvard Law Review 1131.

³⁸ For example see C Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1993); T Prosser, *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (Oxford: OUP, 2010).

³⁹ P Vincent-Jones, 'The Regulation of Contractualisation in Quasi-Markets for Public Services' [1999] Public Law 304; J Kaye and others, *Governing Biobanks: Understanding the Interplay between Law and Practice* (Oxford: Hart, 2012).

in the context of equality and human rights enforcement. This is because it better captures the distinction in equality and human rights enforcement between ensuring compliance (conformity to legal rules) and promoting implementation (going beyond formal legal rules to mainstream equality and human rights).⁴⁰ Traditionally, researchers have concentrated heavily on compliance through court enforcement and this has acted to obscure compliance and implementation through a wide range of other actors (such as the EHRC, sector-specific enforcers, NGOs, business groups, charities, companies and individuals). Thus it is argued and will be illustrated throughout the article, that the concept of regulatory space better captures the reality of equality and human rights enforcement than only focusing on the outcomes of private individual enforcement in courts.

THE REGULATORY SPACE OF EQUALITY AND HUMAN RIGHTS

It was argued in the previous section that in order to effectively understand a regulatory space and hence regulation in a particular sector, there is a need to explore the roles of different bodies within regulatory space and to examine the relationships between these bodies. Once the roles and relationships between regulatory bodies are visible, it is possible to make suggestions about how their capacities can be enhanced or constrained to re-adjust relations between them to improve regulation within the sector. Therefore, this section of the article focuses on the roles of different bodies within the regulatory space of equality and human rights exploring the enforcement tasks they fulfil, and

⁴⁰ P Hunt, 'Configuring the UN Human Rights System in the "Era of Implementation": Mainland and Archipelago' (2017) 39 Human Rights Quarterly 489, 495-501.

crucially the tasks they are ill-suited or unable to perform. Through undertaking this task, an enforcement role for the EHRC becomes visible. While there is a range of actors within the regulatory space of equality and human rights (such as NGOs, business groups, charities, companies, and individuals) due to limits of space the article focuses on the three key actors within the shared regulatory space: the courts, sector-specific enforcers, and the EHRC.

Private enforcement through the courts

Both the Equality Act 2010 and the Human Rights Act 1998 recognise private enforcement by individuals through judicial determination in courts and tribunals as the primary vehicle for enforcing equality and human rights claims. Sections 114, 120 and 127 of the Equality Act 2010 grant jurisdiction to county courts and employment tribunals (the venue depends on the sector where discrimination occurs) to determine any alleged contraventions of the Act. Sections 3, 4 and 7 of the Human Rights Act 1998 give courts (and in some cases tribunals), respectively, powers to interpret legislation so far as it is possible to do so to ensure the legislation is compatible with Convention rights, issue a declaration of incompatibility when this is not possible and to hear claims brought by victims of alleged breaches by public authorities (as well as hearing claims advanced in other proceedings, such as using human rights as a defence in criminal proceedings).

In contrast to the public enforcement bodies that will be discussed later (ie sector-specific enforcers), private enforcement by individuals through the courts has a number of advantages. One key advantage is that public enforcement bodies just do not have the

resources to tackle every equality and human rights infringement and so private enforcement can act to fill this gap.⁴¹ Additionally, even if public enforcement bodies could tackle every infringement, in many cases it would not be an efficient use of resources as individuals themselves are often in a better position to challenge breaches of the law due to their situated knowledge. By allowing willing individuals to privately challenge infringements, the resources of public enforcers can be more effectively directed to where they are most needed.⁴² Furthermore, courts utilise more principled reasoning (they must give reasons for their decisions and try to be consistent and transparent); are likely to be more independent and impartial and have more expertise in terms of interpreting legal documents and dealing with conflicting claims, which provide greater legitimacy and gravitas to court decisions.⁴³ Finally, a key advantage of private enforcement via the courts is that it gives greater opportunity to the judiciary to elucidate (and in some cases expand) the law and reinforce important social values.⁴⁴ Consequently, judicial decisions have had an important impact on equality and human rights. For example, in *Ghaiden v Godin-Mendoza*, the House of Lords used its powers under s 3 of the Human Rights Act to extend statutory tenancy inheritance rights under the Rent Act 1977 to same-sex couples even though this was not intended by parliament when the act was passed.⁴⁵

⁴¹ J M Glover, 'The Structural Role of Private Enforcement Mechanisms in Public Law' (2012) 53 William and Mary Law Review 1137, 1153.

⁴² S B Burbank, S Farhang and H M Kritzer, 'Private Enforcement' (2013) 17(3) Lewis & Clark Law Review 637, 663-4.

⁴³ D Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: OUP, 2007) 120-128; J King, *Judging Social Rights* (Cambridge: CUP, 2012) 61-63.

⁴⁴ K Yeung, 'Privatizing Competition Regulation' (1998) 18 Oxford Journal of Legal Studies 581, 590.

⁴⁵ *Ghaiden v Godin-Mendoza* [2004] UKHL 30.

Although the judicial determination of equality and human rights claims is important, this private enforcement model is limited in Britain as there are numerous equality and human rights enforcement tasks for which British courts are ill-suited to perform. First, courts are limited to deciding the case before them and thus are generally ill-suited to purposefully take more wide-ranging action.⁴⁶ This narrow case-specific focus often prevents court judgments tackling systemic issues and the root causes of equality and human rights breaches.⁴⁷ Linked to this, courts are reliant on the information that the parties to the proceedings place before them and cannot engage in more wide-ranging factual enquiries, which provides a narrow evidence base on which to make decisions.⁴⁸ Secondly, remedies are often very individualistic and judges are generally unwilling to provide more wide-ranging transformative remedies.⁴⁹ On the occasions where courts do provide wider remedies, an additional problem is that courts are not best able to undertake monitoring and ensure their judgments are carried out.⁵⁰

⁴⁶ C R Kumar, 'National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights' (2003) 19 American University International Law Review 259, 295.

⁴⁷ S Marks, 'Human Rights and Root Causes' (2011) 74(1) Modern Law Review 57. This can be seen in *Bellinger*, where the House of Lords refused to extend marriage to transsexuals as it would represent a major change in the law, with far-reaching ramifications (*Bellinger v Bellinger* [2003] UKHL 21 [34]-[40]).

⁴⁸ *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) paras 37-38.

⁴⁹ L Lustgarten, 'Racial Inequality and the Limits of the Law' (1986) 49(1) Modern Law Review 68, 73-4; N O'Brien, 'Ombudsmen and social rights adjudication' [2009] Public Law 466, 470; S Fredman, *Discrimination Law* (2nd edn, Oxford: OUP, 2011) 289.

⁵⁰ M McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* (Ithaca: Cornell University Press, 1986) 226; G Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991) 16. The problematic nature of court monitoring was recognised by the House of Lords in *Re S* where their Lordships overturned a decision of the Court of Appeal which created a role of continued oversight for courts of local authority care plans under the Children Act 1989. Lord Nicholls argued that in addition to departing substantially from a fundamental feature of the Act and thus crossing the boundary between interpretation and amendment, the oversight role for courts also created important practical repercussions for the local authorities which the court was not equipped to evaluate (*Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10 [40]-[43]).

Third, enforcement via judicial determination is heavily hampered by individuation. Private enforcement requires both an individual who has been harmed to bring a claim and there to be an identifiable defendant who can be blamed.⁵¹ In many cases though, harmed individuals may be unable or unwilling to commence legal action. In theory, anyone is entitled to access the court system, but in reality, litigation is time-consuming and costly, which acts as a barrier for many potential litigants.⁵² Even if there is a willing and able claimant, the complex nature of inequality and human rights means that there may be no individual or organisation that can readily be blamed resulting in the issue going unchallenged.⁵³ Furthermore, in some cases individuals may not know they have been harmed, believing barriers to be normal or justified (eg a job advert that requires applicants to work full-time when in reality the job could be performed part-time).⁵⁴ Consequently, the situations in which equality and human rights issues can be judicially determined are actually quite narrow. Finally, in order to hear equality and human rights claims courts are reliant on rights being justiciable, which in a dualist system such as the UK requires incorporation within domestic law. Although courts can consider non-incorporated human rights when making their decisions, individuals cannot bring a claim based upon them.⁵⁵ These limitations have caused commentators to label judicial

⁵¹ L Lustgarten, 'Racial Inequality and the Limits of the Law' (1986) 49(1) *Modern Law Review* 68, 72; C O'Cinneide, 'The catalytic potential of equality and human rights commissions' (2016) 24(1) *Journal of Poverty and Social Justice* 7, 8.

⁵² T Hickman *Public Law's Disgrace* (2017), available at <https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/>; D Brinks and V Gauri, 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (2014) 12(2) *Perspectives on Politics* 375.

⁵³ In some instances of human rights infringements, there may be an individual/organisation at fault but they are not performing a public function under s 6 of the Human Rights Act so proceedings cannot be commenced against them under s 7: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another* [2003] UKHL 37; *YL v Birmingham City Council and others* [2007] UKHL 27.

⁵⁴ S Fredman, *Discrimination Law* (2nd edn, Oxford: OUP, 2011) 285-6.

⁵⁵ *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536.

determination of equality and human rights as a ‘hollow hope’ or ‘like trying to etch figures in glass with a pick-axe’.⁵⁶

It should be noted that these constraints need not be fatal, with many commentators arguing that they can and should be overcome. For instance, it would be possible to widen standing, make claims less financially risky for applicants and introduce a wider range of justiciable human rights.⁵⁷ However, while accepting courts are not as effective as they could be, this article is focused on a different task. While we should not give up on advocating greater access to justice through the courts, the reality is that even if there were substantial reforms to enhance individual enforcement mechanisms, there would still be enforcement gaps that courts could not fill (for example they could still not take the wide perspective of other bodies or adequately monitor remedies). Consequently, there is a need to examine the enforcement role of other bodies (primarily sector-specific enforcers and the EHRC) in the regulatory space of equality and human rights.

Sector-specific enforcement

Alongside the judiciary, sector-specific enforcers have also been given responsibility to address equality and human rights issues. Under section 6 of the Human Rights Act 1998, public authorities (which includes regulators, inspectorates, and ombudsmen) must

⁵⁶ G Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); L Lustgarten, ‘Racial Inequality and the Limits of the Law’ (1986) 49(1) *Modern Law Review* 68, 77.

⁵⁷ S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: OUP, 2008), ch 5; T Hickman *Public Law’s Disgrace* (2017) available at <https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/>; K Boyle and El Hughes, ‘Identifying routes to remedy for violations of economic, social and cultural rights’ (2017) 22 *The International Journal of Human Rights* 43.

act in a way which is compatible with the rights contained within the European Convention on Human Rights. Under section 149 of the Equality Act 2010, public authorities must, when exercising their functions, have due regard to the need to eliminate discrimination, harassment and victimisation; advance equality of opportunity and foster good relations. Schedule 19 of the Equality Act 2010 specifically lists the majority of regulators, inspectorates, and ombudsmen as being subject to the duty. Additionally, some enforcers are explicitly required to take equality and human rights concerns into account when discharging their functions. For example, the Care Quality Commission (CQC) is required to have regard to the need to protect and promote the rights of people who use health and social care services.⁵⁸ As a result of these provisions, sector-specific enforcers are required to take account of equality and human rights in their decisions and inspections.

In terms of equality and human rights enforcement, sector-specific enforcers can overcome many of the limitations of (or fill the gaps left by) judicial determination. O'Brien outlines that in contrast to courts, ombudsmen are informal, free to both parties, relatively quick and more relaxed in terms of procedures and application of legal principles.⁵⁹ Sector-specific enforcers are also able to offer greater flexibility in terms of remedies with their decisions generally being revisable and with them being able to draw upon their experiences to craft effective remedies with 'systemic bite'.⁶⁰ In addition, they are also better suited to continually monitor remedial action to correct equality/human rights

⁵⁸ Health and Social Care Act 2008, s 4(d).

⁵⁹ N O'Brien, 'Ombudsmen and social rights adjudication' [2009] Public Law 466, 468. Although it should be noted that ombudsmen are not without criticism (for example see C Hood and others, *Regulation inside Government* (Oxford: OUP, 1999) 89-90).

⁶⁰ *ibid*, 470.

abuses than courts. This can be seen in the situation where a Health Trust was found to have failed in its care of a cancer patient that suffered a major fit and died, the Parliamentary and Health Services Ombudsmen (PHSO) required the Trust to apologise to the patient's wife and issue her compensation; draw up an action plan to address the learning points from the PHSO's investigation and provide updates on certain aspects of the Trust's work.⁶¹

A further benefit of sector-specific enforcers is that while courts are reactive (only being able to hear complaints where there is both an individual who has been harmed and an individual who can be blamed), regulators and inspectorates are proactive. By being vigilant for equality and human rights issues during inspections, sector-specific enforcers can tackle compliance concerns before anyone has been harmed by them. Sector-specific enforcement can also deal with situations where harm has occurred but individuals are not aware they have been harmed. An illustration of this would be the joint monitoring of the Deprivation of Liberty Safeguards in Wales by the Care and Social Services Inspectorate Wales and the Health Inspectorate Wales. Under these safeguards, care homes and hospitals must apply to the relevant supervisory body for approval to deprive someone of their liberty. Nevertheless, there is a danger that if the system is not working as required (eg supervisory organisations taking too long to make decisions and undertake reviews) that individuals can wrongfully be deprived of their liberty. By highlighting the failings of the system (the latest report states that the system

⁶¹ PHSO *Failure to provide appropriate care for a cancer patient who suffered a major fit and died* (2015) available at <https://www.ombudsman.org.uk/about-us/how-our-casework-makes-difference/case-summaries/1079>.

is struggling to cope and is unfit for purpose), the joint report aims to encourage state action before further human rights infringements occur, and thus bypass relying on vulnerable individuals to commence legal proceedings once they have been harmed.⁶²

A final advantage of sector-specific enforcement over judicial determination is that it is much easier for sector-specific enforcers to incorporate non-justiciable rights into their work and hence give them effect. Thus, while individuals cannot directly assert their rights under the UN Conventions on the Rights of the Child and the Rights of Persons with Disabilities in British courts, the CQC incorporates these standards into its enforcement work, thus giving the rights real substance within the health and social care sector.⁶³

Although sector-specific enforcement can overcome many of the limitations of equality and human rights enforcement connected with judicial determination, enforcement by regulators, inspectorates and ombudsmen has a number of restrictions. First, its sector-specific nature makes a uniform enforcement approach difficult. Disparities in enforcement can occur because different enforcers have adopted varying interpretations of the requirements of equality and human rights or because one enforcer places much greater weight on equality and human rights than another enforcer. This makes it difficult for those subject to enforcement to adopt a consistent organisational approach to equality and human rights as many regulatees operate in different sectors and thus will be subject to competing equality and human rights requirements by different enforcers. Enforcement

⁶² Care and Social Services Inspectorate Wales and Health Inspectorate Wales, 'Deprivation of Liberty Safeguards: Annual Monitoring Report for Health and Social Care 2015-16' (CSSIW and HIW 2016).

⁶³ Care Quality Commission, 'Human rights approach for our regulation of health and social care services' (CQC 2014) 14-15.

by multiple enforcers can also result in equality and human rights concerns being overlooked as one enforcer believes another enforcer is tackling those issues.

A further restriction is that most sector-specific enforcers have very limited knowledge of the requirements of equality and human rights law. While equality and human rights issues may be prominent in the specific sector, the primary role of sector-specific enforcers is not equality and human rights enforcement. The staff at each enforcer are appointed for their skills and expertise related to the primary role and therefore will generally lack knowledge about equality and human rights requirements. Consequentially, however willing they may be, the lack of legal knowledge makes it difficult for sector-specific enforcers to enforce equality and human rights issues within their work. This was seen in a report by the Office for Public Management (OPM) into the role and experience of sector-specific enforcers in incorporating human rights into their work, which found that while there was commitment to human rights at an organisational level, at an individual level knowledge was very limited, with individuals unsure of the content of human rights, the requirements of the Human Rights Act, and the relevance of human rights to their day-to-day roles.⁶⁴

A final limitation, linked to sector-specific enforcers' lack of knowledge about equality and human rights, is the distance of enforcers from judicial determinations. Given that equality and human rights enforcement is not their primary role, sector-specific enforcers are less likely to keep up to date with current equality and human rights jurisprudence. Thus, the

⁶⁴ Office for Public Management, *The role and experience of inspectorates, regulators and complaints-handling bodies in promoting human rights standards in public services* (EHRC 2009) 21.

OPM report also found that respondents varied in the extent that they felt that they should keep up to date with human rights jurisprudence and their awareness of how they could do this.⁶⁵ Not keeping up to date with the law can potentially lead to sector-specific enforcers overlooking clear breaches of the law or accidentally encouraging those subject to enforcement to engage in unlawful actions. This is especially so given that the majority of OPM respondents lacked awareness of whether changes in human rights law fed back into the enforcers' policies and practices.⁶⁶ The proximity of enforcers to those subject to their enforcement mean that regulatees are much more likely to follow the requirements of enforcers than formal legal requirements (of which they may have little knowledge or understanding).⁶⁷ This disconnect between sector-specific enforcer practice and current jurisprudence significantly hampers effective equality and human rights enforcement.

In summary, sector-specific enforcers can fulfil some of the enforcement gaps left by the courts (they can deal with equality and human rights issues beyond a specific individual case, they do not have to set institutional limits, they can provide wider remedies, do not generally require specific individuals to claim/be blamed and can more easily deal with unincorporated rights). However, there are also numerous drawbacks to sector-specific enforcement (ie enforcement disparities between enforcers, an overall lack of knowledge of equality and human rights standards and significant distance from formal court decisions). As with individual enforcement through the courts, the limitations of sector-specific enforcement do not have to be fatal to the effective protection of equality and

⁶⁵ *ibid* 33.

⁶⁶ *ibid*.

⁶⁷ *ibid* 58.

human rights law, as the EHRC still has a role to play in the shared regulatory space of equality and human rights. It is to this role that the rest of the article now turns.

THE ROLE OF THE EQUALITY AND HUMAN RIGHTS COMMISSION

The previous section outlined the roles of two types of key actors (the courts and sector-specific enforcers) within the regulatory space of equality and human rights. As was outlined in the first section, once an understanding of the roles of actors within regulatory space is gained, effective regulation is achieved by enhancing or constraining the capacities of different bodies. Yet, in relation to the enforcement of equality and human rights, the roles of the courts and sector-specific enforcers are unlikely to be enhanced and if anything, are more likely to be constrained (eg if the Human Rights Act is repealed without being replaced). Therefore, the positions of courts and sector-specific enforcers within the regulatory space of equality and human rights are largely fixed. This makes the role of the EHRC within the regulatory space take on added importance, as its wide-ranging powers mean that it can adopt an enforcement role as wide (such as re-inspecting all regulatees already inspected by sector-specific enforcers) or as narrow (only issuing guidance to actors) as necessary to fill the enforcement gaps.

Given the concerns with the performance of the EHRC, it is important that the Commission adopts an effective role for itself within the regulatory space of equality law and human rights, to avoid having its capacities further constrained by the Government. It was seen in the previous section that the courts and sector-specific enforcers discharge a number of key enforcement tasks (eg the courts elucidate and expand the law and

sector-specific enforcers tackle potential harm before it occurs). Both bodies are also able to carry out some tasks that the other body is unable to successfully complete (for example courts can adopt a consistent approach to the law that applies across different sectors and sector-specific enforcers can utilise non-incorporated rights in their enforcement work thereby giving them effect in Britain). However, there are still a number of tasks that are not effectively performed by either the courts or sector-specific enforcers (such as wide-ranging monitoring of the effectiveness of the law across society) and constraints on the abilities of both to act effectively that are not always corrected by the other type of body (such as difficulties of individuals accessing a court and sector-specific enforcers lacking knowledge of equality and human rights standards). Through these observations it is possible to outline an effective role for the EHRC that consists of three primary tasks: (1) carrying out enforcement action that courts and sector-specific enforcers are unable to perform; (2) overcoming some of the limitations of individual enforcement via the courts; and (3) coordinating and supporting sector-specific enforcers. The remainder of the article will now expand on these tasks and illustrate how they can effectively be performed by the Commission.

1. Carrying out enforcement action that courts and sector-specific enforcers are unable to perform

The first key aspect of the EHRC's role is undertaking enforcement action that courts and sector-specific enforcers are unable to perform. The Commission can use its full range of powers to fulfil this role, but particularly useful are the powers of monitoring (on both the effectiveness of equality and human rights law and progress in society) and ability to

launch inquiries to compensate for the limitations of enforcement via judicial determination and sector-specific enforcement, primarily by taking enforcement action at a society-wide level (or at least at a multi-sector level).⁶⁸ Whereas courts are limited to the issue before them so cannot tackle systemic issues and, sector-specific enforcers can only focus on issues within their sector which means they may miss or inconsistently tackle multi-sector issues, the EHRC can highlight and tackle equality and rights concerns at a societal level. The Commission has recognised the importance of this task (with it being one of its principles for prioritising issues) and has taken a number of actions to tackle societal and cross-sector issues.⁶⁹ One key programme of work is monitoring, with the Commission constructing a monitoring framework and undertaking triennial reviews to assess the state of equality and human rights implementation in Britain.⁷⁰ Although there are other actors that could undertake aspects of this monitoring work (such as sector-specific enforcers and civil society organisations), the EHRC is uniquely placed to take a detailed and pan-societal approach to monitoring.

Another key mechanism for the Commission to undertake unique enforcement actions is through inquiries. For example, it has undertaken an inquiry into disability-related harassment.⁷¹ While it is possible for individuals to challenge the harassment they have experienced through the courts and sector-specific enforcers to address harassment within their sector, both bodies are unable to capture the wide-ranging and systemic

⁶⁸ The Commission could also use some of its other powers here such as investigations (although inquiries are much wider and therefore likely to prove more cost effective) and providing information (which is often follows monitoring and inquiries).

⁶⁹ EHRC, *Strategic Plan: 2016-19* (EHRC 2016) 5.

⁷⁰ EHRC, *Is Britain Fairer? The state of equality and human rights 2015* (EHRC 2015).

⁷¹ EHRC, *Hidden in plain sight: Inquiry into disability-related harassment* (EHRC 2011).

nature of this harassment, with the EHRC being in a much better position to investigate concerns. In addition, the EHRC is undertaking work to ensure equality and human rights are protected after the UK leaves the EU.⁷² Although judicial determination and sector-specific enforcers could address aspects of this work they are unable to take the broad and uniform approach that the EHRC can. Furthermore, there are situations where neither the courts (because there is no organisation with alleged responsibility) or sector-specific enforcers (because there is no relevant sector-specific enforcer) can take action, and thus the EHRC is best placed to act. This can be seen with the Commission's inquiry into diversity on FTSE 350 boardrooms, where although there is a lack of diversity there is often no obvious act of discrimination that can be challenged in a court and there is no sector-specific enforcer.⁷³

While the Commission has begun to carry out enforcement actions that courts and sector-specific enforcers have been unable to perform, its work in this area has been hampered by the significant budget cuts that it has endured, which has meant that the Commission has had to seriously change the way it operates. Thus, the threshold for conducting inquiries has now been set at a high level so they will be undertaken much less frequently.⁷⁴ However, budgetary cuts have also had some advantages on how the Commission conducts inquiries. For instance, the EHRC has significantly streamlined its monitoring framework making it easier and less costly to undertake the triennial review. Prior to having its budget cut, the Commission had four different measurement

⁷² EHRC, 'Healing the divisions: A positive vision for equality and human rights in Britain' (EHRC 2017).

⁷³ EHRC, *An inquiry into fairness, transparency and diversity in FTSE 350 board appointments* (EHRC 2016). This can also be seen in the Commission's investigation into the Metropolitan Police: EHRC, 'Section 20 investigation into the Metropolitan Police Service' (EHRC 2016).

⁷⁴ EHRC, 'Phase 2 consultation response on our Strategic Plan 2012-15' (EHRC 2012) 14.

frameworks: the Equality Measurement Framework for Adults; the Children's Measurement Framework; the Good Relations Measurement Framework and the Human Rights Measurement Framework.⁷⁵ In total these four frameworks consisted of 198 indicators which made reporting on them 'onerous and unmanageable'.⁷⁶ Consequently, the new measurement framework is much more specific and focused consisting of eighteen core indicators (which will be reported on every three years) and seven supplementary indicators (which will be reported on every nine years) making the task of monitoring much more achievable and significantly easier to communicate to stakeholders.⁷⁷

In relation to inquiries, budget cuts have forced the Commission to place greater emphasis on multi-agency working, working cooperatively with a range of organisations, in particular, sector-specific enforcers. Prior to the budget cuts, in two of its early inquiries, the EHRC explored recruitment and employment in the meat and poultry processing sector and human rights in the home care of older people. Both inquiries had significant overlap with the remit of sector-specific enforcers (the Health and Safety Executive (HSE) in the former and the Care Quality Commission (CQC) in the latter).⁷⁸ In both inquiries, neither the HSE or CQC were given key roles and the EHRC merely replicated work for

⁷⁵ S Alkire and others, *Developing the Equality Measurement Framework: Selecting the indicators* (EHRC 2009); H Holder, T Tsang and P Vizard, *Developing the Children's Measurement Framework: Selecting the indicators* (EHRC 2011); A Wigfield and R Turner, *Good Relations Measurement Framework* (EHRC 2010); J Candler and others, *Human Rights Measurement Framework: Prototype panels, indicator set and evidence base* (EHRC 2011).

⁷⁶ EHRC, *Measurement Framework for Equality and Human Rights* (EHRC 2017) 22.

⁷⁷ EHRC, *Measurement Framework for Equality and Human Rights* (EHRC 2017) 27-9.

⁷⁸ EHRC, *Inquiry into recruitment and employment in the meat and poultry processing sector: Report of the findings and recommendations* (EHRC 2010); EHRC, *Close to home: An inquiry into older people and human rights in home care* (EHRC 2011).

which both enforcers had responsibility for. In the period after its budget was cut the Commission has recognised the need to use its remaining budget effectively by acting strategically and avoiding duplication and has thus placed significant weight on partnership with sector-specific enforcers (discussed in more detail below).⁷⁹ Since this change in approach the only inquiry that the EHRC has undertaken where sector-specific enforcers also had enforcement power was a cross-sector inquiry (which, as outlined earlier, no sector-specific enforcer could adequately address individually) on preventing deaths in detention of adults with mental health conditions, and all relevant sector-specific enforcers were involved in the inquiry.⁸⁰ Thus in relation to this aspect of the Commission's role, the approach of the EHRC would appear to conform with the findings of Sarah Spencer and Colin Harvey's wider study of UK and Irish equality and human rights institutions that while resources 'are essential to carry out some functions; hence, the budget has a bearing on performance...a tight budget can encourage a strategic use of the levers available'.⁸¹ This would appear to be the case here as while large budget cuts have restricted the Commission's ability to act which has curtailed its enforcement potential (for example, budget cuts have restricted the number of inquiries the EHRC can undertake), it has caused the Commission to act more strategically. The EHRC has done this by focusing its enforcement actions to ensure they are as effective as they can be, through streamlining its monitoring mechanisms and engaging in multi-agency working. Given the Commission is uniquely placed to fulfil these enforcement activities (particularly

⁷⁹ EHRC, *Strategic Plan Revision for 2015/16* (EHRC 2015) 6.

⁸⁰ EHRC, *Preventing Deaths in Detention of Adults with Mental Health Conditions: An Inquiry by the Equality and Human Rights Commission* (EHRC 2015).

⁸¹ S Spencer and C Harvey, 'Context, institution or accountability? Exploring the factors that shape the performance of national human rights and equality bodies' (2014) 42(1) *Policy & Politics* 89, 102.

undertaking inquiries), additional government funding for the EHRC would be justified for these activities. Alongside this though, the Commission should continue to focus its resources on these enforcement actions, particularly ensuring maximum value for money by cooperating with other relevant bodies to increase the effectiveness of the overall enforcement regime.⁸²

2. Overcoming some of the limitations of individual enforcement via the courts

Within the shared regulatory space of equality and human rights, the courts and the EHRC have been given distinct but closely related roles. The courts and the EHRC can work independently without a failure of the equality and human rights enforcement regime, but enforcement will be most effective when they cooperate. Through judicial determination of equality and human rights claims, courts can provide the EHRC with important legal frameworks, which the Commission can utilise to improve the protection and promotion of equality and human rights.⁸³ The EHRC, in turn, can utilise its powers to work with courts to overcome some of the limitations of judicial determination and thus improve the ability of courts to hear equality and human rights cases. It was seen earlier that a potential limitation of judicial determination is difficulties with access to the courts. The Commission can overcome this limitation by utilising its powers to provide advice to individuals where they believe their rights have been breached, they can also provide

⁸² J Freeman and J Rossi, 'Agency Coordination in Shared Regulatory Space' (2012) 125(5) Harvard Law Review 1131, 1182.

⁸³ C R Kumar, 'National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights' (2003) 19 American University International Law Review 259, 295; EHRC, 'Can you help us to help others?' (EHRC 2018).

legal assistance in specific equality cases, or institute legal proceedings themselves.⁸⁴ Additionally, while courts are typically limited in the information they have before them, the Commission can use its power to intervene in legal proceedings to provide information to courts to improve the evidence basis that courts have before them when making decisions.

In terms of the relationship between courts and the EHRC, interaction takes place solely in the courtroom when the EHRC either institute or intervene in legal proceedings. This results in the courts and the EHRC being in a principal-agent relationship, with the court as the principal and the EHRC as the agent.⁸⁵ As the principal, the courts exert considerable control over the EHRC within their shared regulatory space, determining if it can institute/intervene in legal proceedings, the extent of the Commission's intervention and the weight placed upon the Commission's submissions. As an agent, to play an effective enforcement role, the EHRC needs to comply with the wishes of the court. In a study of interventions in the Supreme Court of Canada, Alarie and Green outline three functions interventions can serve: (i) providing objectively useful information to the court; (ii) providing the 'best' argument for certain partisan interests; and (iii) allowing interveners to have their voices heard.⁸⁶ As an agent, to positively influence judicial determinations on equality and human rights issues, the EHRC needs to fulfil the needs of the courts.

⁸⁴ A strategic litigation approach was a significant tool for the EHRC's predecessors: C O'Cinneide, 'The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times' (2007) 36(2) *Industrial Law Journal* 141, 149-150.

⁸⁵ G Stoker, 'Governance as theory: five propositions' (1998) 50(155) *International Social Science Journal* 17, 22; J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) 54(1) *Current Legal Problems* 103, 145.

⁸⁶ B Alarie and A Green, 'Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance' (2010) 48 *Osgoode Hall Law Journal* 381, 381.

The courts are concerned with resolving the direct legal dispute and therefore want the EHRC in its interventions to fulfil the first function (ie provide objectively useful information). As Baroness Hale states, 'interveners are, or should be there to provide us with evidence and arguments with which, for whatever reason, the parties are unlikely or unable to provide us, so that...we can get a more rounded picture of the problem'.⁸⁷ Therefore, if the EHRC is to work effectively with the courts, it needs to fulfil the first function of interveners and provide the courts with objectively useful information.

There are two main obstacles that currently inhibit the Commission overcoming some of the constraints of judicial enforcement through the courts. The first, seen in the previous part, is the impact of the heavy budget cuts. This has meant the EHRC, in its second iteration under the chairship of Onora O'Neill, became much less ambitious, only using its legal powers as a last resort.⁸⁸ Consequently, the Commission moved away from providing legal advice and legal assistance, recognising that there were other organisations in society who provided these services and instead placed increased emphasis on (the more cost-effective) intervention in ongoing legal proceedings.⁸⁹

The second obstacle, relating to interventions, is that the EHRC is not currently performing the task it has been allotted by the courts. By examining cases where the EHRC has intervened it can be seen that, while courts want the Commission to provide

⁸⁷ Baroness Hale of Richmond, 'Who Guards the Guardians?' (2014) 3(1) Cambridge Journal of International and Comparative Law 100, 110.

⁸⁸ EHRC, 'Strategic Plan: 2012-15' (EHRC 2012) 8; EHRC, 'Phase 2 consultation response on our Strategic Plan 2012-15' (EHRC 2012) 5. This was taken further in 2015 when the Commission adopted a strategic litigation policy: EHRC, 'The Equality and Human Rights Commission's Strategic Litigation Policy' (EHRC 2015).

⁸⁹ EHRC, 'Business Plan 2016/17' (EHRC 2016) 16-17.

objectively useful information, the Commission is instead providing the best argument for partisan interests.⁹⁰ Thus, Baroness Hale argues that ‘from the point of view of the court it can sometimes be difficult to disentangle the private interests of the client from the broader public interests of the Commission’.⁹¹ This can often put courts and the EHRC into conflict resulting in courts often ignoring, or placing limited weight, upon the Commission’s interventions. For example, in *Slack*, the appeals took on a more complicated form due to the issues being transformed by the intervention of the EHRC who introduced a range of fresh legal arguments.⁹² In *Bracking (No. 2)* the EHRC tried to encourage the judge to read a report of the Joint Parliamentary Committee on Human Rights, yet the judge refrained as it did not sound particularly useful, it was unlikely to help decide the issues in the case and there was a very real danger of infringing the rules on Parliamentary privilege.⁹³ Finally in *Smith* the EHRC was criticised by Lord Collins in the Supreme Court for encouraging the judge in an earlier stage of the proceedings to answer a question which, although the Commission deemed it of general significance and importance, was academic to the facts of the case: ‘There is an obvious danger in giving what are in substance advisory opinions on hypothetical facts divorced from any concrete factual situation’.⁹⁴

⁹⁰ It should be noted that this is a trend and not a rule and that there are examples of cases that do not conform to this trend, such as *J*, where the Court of Appeal gave great weight to the EHRC’s arguments (*R. (J) v Worcestershire County Council (Equality and Human Rights Commission Intervening)* [2014] EWCA Civ 1518).

⁹¹ Baroness Hale of Richmond, ‘Who Guards the Guardians?’ (2014) 3(1) Cambridge Journal of International and Comparative Law 100, 106.

⁹² *Slack and Others v Cumbria County Council (Equality and Human Rights Commission, intervening)* [2009] EWCA Civ 293 [20].

⁹³ *R. (Aspinall) v Secretary of State for Work and Pensions v The Equality and Human Rights Commission* [2014] EWHC 4134, paras 119-122. This can also be seen in *H: H v Commissioner of Police of the Metropolis (Liberty and another intervening)* [2013] EWCA Civ 69 [42].

⁹⁴ *R. (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission Intervening)* [2011] 1 AC 1 [223].

Consequently, in order to be more successful in this area, rather than providing the best arguments for partisan interests, the Commission needs to focus on providing courts with objectively useful information. This is particularly important in light of section 87 of the Criminal Justice and Courts Act 2015, which requires interveners to pay some or all of the parties' costs (unless there are exceptional circumstances) if the intervener has acted in substance as the main party, the intervener's evidence and representations have not been of significant assistance to the court or a significant part relates to matters that are not necessary for the court to consider, or the intervener has behaved unreasonably. Therefore, rather than just having its interventions ignored, the EHRC could now find that there are significant cost implications if it continues with its current approach, reducing its budget even further.

Given that the Commission is wanting to obtain favourable rulings from courts to help with its other enforcement activities (such as promoting greater compliance and implementation) it is perhaps unreasonable to expect it to fulfil the implementation role desired by courts and provide objectively useful information. Consequently, rather than intervening in cases, if the EHRC is going to continue to advance their own partisan interests, it would be better to focus on providing legal assistance or instituting proceedings itself. The third iteration of the Commission (under the chairship of David Isaacs) is working towards this and expanding the number of cases it assists, which should be encouraged.⁹⁵ However, a limitation in this area is that the Commission is only

⁹⁵ D Isaac *Prioritising our legal work* (2017), available at <https://www.equalityhumanrights.com/en/our-work/blogs/prioritising-our-legal-work>; EHRC *Legal Support Project: helping people to get legal assistance* (2017), available at <https://www.equalityhumanrights.com/en/legal-casework/legal-support-project-helping-people-get-legal-assistance>.

able to provide legal assistance for equality claims and not human rights claims. This might not seem particularly problematic because the EHRC can institute human rights claims in its own name, yet this is far from ideal in situations where there is a willing but poorly resourced applicant, as it forces the Commission to take over the applicant's case, which acts to take control and autonomy away from the victim, further disempowering them. Consequently, the EHRC would benefit from having its powers to provide legal assistance extended to also cover human rights to avoid these sorts of situation.

3. Coordinating and supporting sector-specific enforcers

In relation to the EHRC and sector-specific enforcers, the powers of both mean they are engaged in a redundancy model of enforcement with both possessing overlapping functions.⁹⁶ This means that both the EHRC and sector-specific enforcers can take identical enforcement action, such as publish information, issue codes of practice, undertake investigations and assess compliance with the public sector equality duty. However, given the wide-ranging nature of equality and human rights regulation and the Commission's reduced budget, it would be impossible for the EHRC to regulate all organisations in society. Consequently, rather than simply repeating the enforcement actions of sector-specific enforcers, to be most effective the EHRC would benefit from using its powers in this area to overcome the limitations of sector-specific enforcement – ie attempt to share knowledge with enforcers to build up their equality and human rights capabilities, support enforcers in enforcement and try to ensure conformity between

⁹⁶ C Scott, 'Accountability in the Regulatory State' (2000) 27(1) Journal of Law and Society 38, 52.

enforcers in different sectors. This means that the relationships between the Commission and sector-specific enforcers in regulatory space are particularly important.

In a similar model to the courts and the EHRC, the Commission could enter into a principal-agent relationship with sector-specific enforcers, with the Commission as principal and enforcers as agents. Under this relationship, the Commission would recruit enforcers and seek to control them in order to ensure that they carry out the EHRC's enforcement work within their sector. Yet it is likely that such arrangements would have only limited success as it is now widely recognised that classic models of control such as principal-agent are not the most effective way of achieving regulatory aims. This is because the principal imposes arbitrary standards externally on agents, without taking into account the specifics of the agents, their capacities and the context in which they operate.⁹⁷ Instead of models of control within a shared regulatory space, a more cooperative approach is needed where enforcement bodies learn about the capacities of themselves and each other to take more effective action.⁹⁸ Thus the EHRC learns about sector-specific enforcers and how best to share knowledge with, support and coordinate the actions of different enforcers and at the same time sector-specific enforcers learn how to develop knowledge and work with the Commission and other sector-specific enforcers.

⁹⁷ J Lenoble and M Maesschalck, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance' in O De Schutter and J Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart, 2010) 10.

⁹⁸ C Scott, 'Reflexive Governance, Regulation and Meta-Regulation: Control or Learning?' in O De Schutter and J Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart, 2010) 47.

Lenoble and Maesschalck outline four approaches to learning, all of which operate on a continuum, progressively expanding the conditions for the success of learning.⁹⁹ The attainment of maximum learning requires a combination of all four approaches.¹⁰⁰ The first approach is *neo-institutionalist*, which rather than imposing arbitrary external conditions on organisations, requires that the external conditions that are imposed are optimal (ie the most effective they can be).¹⁰¹ For the EHRC and sector-specific enforcers this would mean that, rather than imposing the Commission's preferred method of enforcement on sector-specific enforcers and expecting enforcers to carry this out, the Commission instead considers which methods of enforcement would be the 'best fit' for each sector-specific enforcer to achieve compliance and promote implementation within their sector. The Commission would then learn from the performance of sector-specific enforcers how the methods of enforcement and 'fit' of these to particular enforcers could be improved in the future. Although expanding on principal-agent and control approaches to cooperation, the neo-institutionalist approach is not sufficient on its own to establish full learning as the approach does not ensure that those who apply the conditions (ie sector-specific enforcers) do so in the same spirit as those who imposed the conditions (ie the EHRC) and thus the effects may be different from those envisaged.

⁹⁹ J Lenoble and M Maesschalck, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance' in O De Schutter and J Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart, 2010) 8.

¹⁰⁰ P Vincent-Jones, 'Embedding Economic Relationships through Social Learning? The Limits of Patient and Public Involvement in Healthcare Governance in England' (2011) 38(2) *Journal of Law and Society* 215, 221.

¹⁰¹ J Lenoble and M Maesschalck, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance' in O De Schutter and J Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart, 2010) 11-2.

Consequently, the second approach is *deliberative* and builds on the neo-institutionalist approach by recognising that organisations that implement externally imposed conditions are affected in how they enact those conditions by their own internal mechanisms and thus there is a need to act on these mechanisms to improve implementation. Consequently, under the deliberative approach learning takes place through different actors sharing their unique perspectives about the best way to undertake collective action.¹⁰² This would involve the EHRC and sector-specific enforcers engaging in discussions about how sector-specific enforcers could best incorporate equality and human rights considerations into their work. In this way, both the Commission and enforcers learn about enforcement within specific sectors. Nevertheless, learning is still constrained as deliberation takes place within pre-determined power dynamics and actors often lack the capacities to effectively engage in deliberation. With some sector-specific enforcers (perhaps those that lack confidence around equality and human rights or that are newly created) it is likely that the EHRC will dominate discussions as enforcers will lack the capacities (such as knowledge, experience, confidence and resources) to engage in discussions on equal terms. However, in other cases (perhaps where enforcers are large and long-established) it is likely that the enforcer will dominate discussions and the Commission will lack capacities (eg tradition and reputation) to fully engage in discussions. In both situations, deliberation will be inhibited by unequal power dynamics.

¹⁰² J Lenoble and M Maesschalck, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance' in O De Schutter and J Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart, 2010) 13.

The third, *pragmatic* approach aims to overcome the restrictions of the deliberative approach. It does this by encouraging actors to engage in a process of joint inquiry – thus discussions are truly open and all organisations contribute to, and should learn from, the inquiry. All actors are involved in designing solutions, monitoring performance and adjusting solutions accordingly. The process is experimentalist as new solutions create new problems so learning is a continuous process where there is permanent revisions and testing.¹⁰³ This would require the EHRC and sector-specific enforcers to jointly consider how equality and human rights could best be enforced within a specific sector, to jointly design methods of enforcement and to jointly assess the success of these methods. On the basis of this process, both the Commission and the enforcers would learn about different methods and improve their approaches in future. Yet, even if actors are equal partners in deliberation, they can still lack the capacities to engage in the joint inquiry in reality. Thus, other proponents of the pragmatist approach argue that the pre-existing frames need also to be questioned.¹⁰⁴ Actors need to be made aware that when they engage in joint action they bring ‘baggage’ with them which inhibits their ability to learn. This ‘baggage’ includes past experiences, past discussions, beliefs and biases which can (often unconsciously) influence how actors view ‘facts’, understand situations and assess solutions which restricts what can be achieved. Thus, actors should not only engage in joint action but also agree on the framing of issues (eg what are the problems, what are possible solutions, what are the challenges) to more effectively learn and thus

¹⁰³ C F Sabel and J Cohen, ‘Directly-Deliberative Polyarchy’ (1997) 3 European Law Journal 313; C F Sabel and J Zeitlin, ‘Learning from Difference: The New Architecture of Experimentalist Governance in the EU’ (2008) 14 European Law Journal 271.

¹⁰⁴ C Argyris and D Schön, *Theory in Practice: Increasing Professional Effectiveness* (Hoboken, NJ: Jossey Bass, 1974); C Argyris and D Schön, *Organizational Learning: A Theory of Action Perspective* (Boston, MA: Addison Wesley, 1978); C Argyris, *Knowledge for Action: A Guide to Overcoming Barriers to Organizational Change* (Hoboken, NJ: Jossey Bass, 1993).

increase their success. However, the problem of the pragmatist approach is that it assumes knowledge of the limitations of framing is sufficient to encourage actors to reframe issues.

The final approach, the *genetic approach*, argues that knowledge of the problems of framing are insufficient to induce actors to overcome them. Instead, conditions must be put in place that encourage actors to question their representations and the role that they play and construct a new identity that the context requires. Actors should achieve this by learning from their past (by considering what specific identities were taken in the past and what capacities contributed to these identities) and then re-imagining ways to act collectively in the future that are not constrained by the existing frames.¹⁰⁵ In this way actors are truly free to learn without constraints and thus can most effectively engage in joint inquiries to tackle collective problems.

In order to successfully coordinate and support sector-specific enforcers, the EHRC needs to facilitate mutual learning, where sector-specific enforcers learn how to best incorporate equality and human rights into their work and the Commission learns how best to support and coordinate enforcers. As outlined above, learning is optimised under the genetic approach to learning. In the absence of detailed empirical work exploring interactions between the EHRC and enforcers, it is not possible to outline which approaches actors are currently undertaking and how they could move along the

¹⁰⁵ J Lenoble and M Maesschalck, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance' in O De Schutter and J Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart, 2010) 19-20.

continuum to deeper approaches to learning. Instead, a few outline observations will be shared.

The Commission does appear to have moved away from the principal-agent model of cooperation and moved towards more learning based approaches, and aspects of the neo-institutionalist, deliberative and pragmatist approaches can all be observed. In the first two strategic plans, although speaking of cooperation, the Commission outlined how it would work ‘with and through’ existing sector-specific enforcers suggesting that enforcers were a means to an end (ie they would be used to reach a wider range of organisations) and of helping enforcers fulfil ‘their own obligations’ strongly suggesting that incorporating equality and human rights into their work is something that enforcers are obliged to do.¹⁰⁶ In the more recent strategies (2015-16 and 2016-19) there is a softening of language with talk of collaborating with sector-specific enforcers to embed equality and human rights into their approaches to improve public services.¹⁰⁷ This demonstrates a move away from control approaches and has been supplemented with models of working that encourage learning. For instance, the EHRC’s 2014-15 Business Plan spoke of testing and disseminating models for embedding equality and human rights inspection work to enforcers which suggests a neo-institutionalist approach (where the best external models are imposed on enforcers).¹⁰⁸ The Commission also chairs a regulator, inspectorate and ombudsmen (RIO) forum which meets quarterly to share knowledge and experiences around human rights and equality practices. This resulted

¹⁰⁶ EHRC, *Our strategic plan 2009-2012* (EHRC 2009) 22; EHRC, *Our strategic plan 2012-2015* (EHRC 2012) 12.

¹⁰⁷ EHRC, *Strategic Plan Revision for 2015/16* (EHRC 2015) 10.

¹⁰⁸ EHRC, *Business Plan 2014/15* (EHRC 2014) 19.

in a report being produced that promotes the best practice of different enforcers.¹⁰⁹ This would be an illustration of the deliberative approach to learning where enforcers discuss ways to address a shared goal (ensuring greater compliance with and implementation of equality and human rights).

The Commission has also begun to establish relationships with individual enforcers, although the relationships between the EHRC and specific enforcers vary. For example, while the Commission intended to have a close working relationship with the school's regulator, Ofsted, a memorandum of understanding has not been concluded between the two organisations and Ofsted makes little or no reference to equality and human rights law and standards in its inspection literature.¹¹⁰ This is despite equality and human rights being intrinsic to Ofsted's inspection framework (eg the right to education, the right for children to express their views, freedom of expression). In contrast, the EHRC has a close working relationship with the Care Quality Commission (CQC). The EHRC has entered into a memorandum of understanding through which the CQC and the EHRC committed to work together to improve equality and human rights in health and adult social care services.¹¹¹ This has resulted in the Commission and CQC issuing joint guidance on equality and human rights for CQC inspectors and assessors which outlines what equality and human rights issues inspectors should consider when inspecting different aspects of the inspection framework.¹¹² The EHRC has also funded equality and

¹⁰⁹ EHRC, *Human Rights in Action: Case studies from Regulators, Inspectorates and Ombudsmen* (EHRC 2014)

¹¹⁰ EHRC, *Our strategic plan 2009-2012* (EHRC 2009) 64; EHRC, 'Business Plan 2012/13' (EHRC 2012) 12; Ofsted, 'School inspection handbook' (Ofsted 2017).

¹¹¹ EHRC and CQC, 'Memorandum of Understanding' (EHRC)

¹¹² CQC and EHRC, 'Equality and human rights in the essential standards of quality and safety: Equality and human rights in outcomes'.

human rights training for all CQC staff provided by the British Institute of Human Rights.¹¹³ This suggests a more pragmatic approach to learning where both the EHRC and CQC engage in joint inquiries (ie how best to embed equality and human rights into CQC inspection frameworks and to train inspectors and assessors). As stated above, this needs to be explored empirically, but it does suggest that the Commission is beginning to engage in activities that facilitate learning and thus improve the capacity of some, if not all, enforcers to embed equality and human rights considerations into their work, and this is something that should be extended by the EHRC in the future.

CONCLUSION

The article began by arguing that the metaphor of regulatory space could be utilised to capture the reality of equality and human rights enforcement. Through the use of regulatory space, the roles of two key types of enforcement body (courts and sector-specific enforcers) were explored, particularly focusing on the enforcement tasks that both bodies are unable, or ill-suited, to fulfil. It was seen when examining the role of courts that, although their decisions have greater legitimacy and they are in a better position to elucidate/expand the law, there are certain enforcement tasks they are ill-suited to perform including dealing with equality and human rights issues beyond the immediate case, providing wide-ranging transformative remedies, addressing issues where there is no individual able/willing to bring a claim or to blame and dealing with rights beyond those

¹¹³ EHRC, 'New Guidance for Inspectors and Assessors' (EHRC, 28 April 2014) <<http://www.equalityhumanrights.com/about-us/our-work/human-rights/articles-and-speeches/new-guidance-inspectors-and-assessors>> accessed 24 March 2015; EHRC, 'Commission funds new equality and human rights training for Care Quality Commission' (EHRC, 5 March 2015) <<http://www.equalityhumanrights.com/commission-funds-new-human-rights-and-equality-training-care-quality-commission>> accessed 24 March 2015.

which are explicitly incorporated into domestic law. For sector-specific enforcers, it was seen that they are able to fulfil many of these tasks (they can deal with issues beyond individual cases and are not reliant on individuals, can provide remedies and can address unincorporated rights into their work). However, sector-specific enforcers are unable to ensure a uniform approach to equality and human rights enforcement across society as they can only address concerns within their specific sector, they traditionally lack knowledge and expertise of equality and human rights and are fairly distant from court jurisprudence.

By focusing on the tasks that courts and sector-specific enforcers are unable/ill-suited to fulfil it was possible to outline a role for the Commission in equality and human rights enforcement. This role includes three primary tasks: (1) carrying out enforcement action that courts and sector-specific enforcers are unable to perform (ie wide-ranging society-wide/multi-sector enforcement); (2) overcoming some of the limitations of courts (eg providing advice/legal assistance to enable individuals to access the courts or intervening in proceedings to provide the court with a wider evidence base); and (3) coordinating and supporting sector-specific enforcers in their enforcement work (ie share knowledge to build up their human rights capabilities and ensure consistent enforcement practices between enforcers).

This role does not require a radical reconfiguration of the EHRC in which it totally redefines the activities it undertakes but rather requires the Commission to focus on some activities more heavily than others and to more greatly pursue certain forms of working.

Specifically, the Commission needs to place a heavy focus on tasks it is uniquely placed to undertake (such as monitoring and inquiries) given that there are no other bodies who can complete this work, and particularly to engage in multi-agency work where possible to minimise the use of scarce resources. In relation to the Commission's legal powers, the Commission needs to move away from intervening in cases (due to their inability to be objective) to providing legal assistance directly or instituting proceedings themselves. Finally, the Commission needs to continue to develop conditions that facilitate mutual learning with sector-specific enforcers and consider ways to expand existing work in this area. Alongside greater focus by the Commission, the role outlined also suggests additional financial resources from the government are justified to fund activities that no other bodies can adequately fulfil, such as inquiries, as otherwise there is a danger that significant equality and human rights issues are overlooked. Finally, the role supports the expansion of the Commission's legal powers to include assisting human rights cases (as it can currently only assist equality cases) otherwise the EHRC is reliant on instituting human rights proceedings itself, which can be disempowering for victims.

In addition to outlining a role for the EHRC in equality and human rights enforcement, the article has also had the wider aim of illustrating, and hopefully encouraging further research on, equality and human rights enforcement beyond the courts. This is particularly important given the extremely small number of equality and human rights infringements that make it to the courts (in the education context there are only twenty-two reported cases concerning discrimination in state schools since 1983).¹¹⁴ The

¹¹⁴ This number was obtained by undertaking a Westlaw search and excluding disability/special educational needs cases (a special category).

continued heavy focus on compliance in courts obscures the important role of other bodies in ensuring compliance and implementation (such as the EHRC and sector-specific enforcers) and thus gives a very narrow glimpse of the reality of equality and human rights enforcement. Given the crucial role these other bodies play in the shared regulatory space, the future realisation of equality and human rights requires us to widen our perspective.